Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Methods to Target and Eliminate	)	CG Docket No. 17-59
Unlawful Robocalls	)	

COMMENTS OF THE STUDENT LOAN SERVICING ALLIANCE (SLSA)
TO THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

The Student Loan Servicing Alliance ("SLSA") respectfully submits these comments in response to the Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1] SLSA supports the Commission's efforts to establish a robust, comprehensive reassigned numbers database and strongly urges the adoption of a reasonable and effective safe harbor. The establishment of a database should not, however, deter the Commission from promptly revising, in an appropriate proceeding, its current unworkable approach to reassigned numbers.

I. Introduction.

SLSA is a nonprofit trade association made up of approximately 20 federal student loan servicers, who collectively service over 95% of the outstanding student loans in the two chief federal student loan programs, the William D. Ford Federal Direct Loan Program ("Direct Loan Program") and the Federal Family Education Loan Program ("FFELP").[2] SLSA members also

[1] *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, FCC 18-31, CG Docket 17-59 (rel. March 23, 2018) ("*Second FNPRM*").

[2] *See* Congressional Research Service Report, "Federal Student Loans Made Under the Federal Family Education Loan Program and the William D. Ford Federal Direct Loan Program: Terms and Conditions for Borrowers" by David Smole, dated June 7, 2013, for a description of the two programs. https://www.fas.org/sgp/crs/misc/R40122.pdf.

service the vast majority of private education loans. Federal student loans, however, represent by far the largest share of the almost $1.5 trillion student loan market, comprising 92% of outstanding student loans.

II. Background

The Telephone Consumer Protection Act ("TCPA") states that it "shall be unlawful" to "make any call" using an autodialer or an artificial or prerecorded voice, absent certain exceptions, without "the prior express consent of the called party."[3] On July 18, 2015, the FCC adopted a Declaratory Ruling and Order that concluded the term "called party" means the "current subscriber (or the nonsubscriber customary user of the phone)," not the "intended recipient" of the call.[4] Under this approach, a caller faces potential TCPA liability if it attempts to call a consenting individual who has recently abandoned the phone number provided to the caller without informing the caller, and inadvertently reaches someone else to whom the number has been reassigned. To mitigate this "severe" result,[5] the FCC allowed callers that were unaware of a reassignment to make one liability-free call (attempt) to the new subscriber. The caller was liable for all call attempts after the first.

On March 16, 2018, the D.C. Circuit's *ACA Int'l* decision struck down the entirety of the FCC's 2015 Order as it related to reassigned numbers.[6] The court affirmed the FCC's central role in interpreting and applying the TCPA but found arbitrary and capricious a safe harbor that

[3] The TCPA is codified at section 227 of the Communications Act of 1934, as amended. See 47 U.S.C. § 227. *Id.* § 227(b)(1).

[4] *Declaratory Ruling and Order*, FCC 15-72, CG Docket 02-278 (rel. July 10, 2015) *("2015 Order"),* at page 39.

[5] *Id.*, at p. 49, fn 312.

[6] *ACA Int'l v. FCC*, 885 F.3d 687, 692 (D.C. Cir. 2018) (*ACA Int'l*).

exempts callers from liability for only one call (attempt) to a reassigned number.[7] The court invalidated the entirety of the reassigned numbers framework because it could not sever the "called party" and safe harbor issues, and could not ascertain what the FCC would have done had the FCC known that its one-call safe harbor approach was not permissible.[8]

On March 23, 2018, the FCC released the Second FNPRM, which proposes "to ensure that one or more databases are available to provide callers with the comprehensive and timely information they need to avoid calling reassigned numbers."[9] On May 14, 2018, the FCC released the ACA Remand Notice, which seeks comment on certain issues left open by the ACA decision, including liability for calls to reassigned numbers and the proper legal interpretation of "called party."[10]

III. The FCC Should Clarify that "Called Party" Means "Intended Recipient."

The FCC should interpret the term "called party" to mean the caller's intended recipient. Under this approach, callers could demonstrate that they intended to reach their consenting customer based on a variety of reasonable steps to verify that their consenting subscriber was still using that phone number. Some examples include:

- Subscribing to one of the third-party reassigned number verification services;
- Providing a mechanism for an individual to update his or her contact information;
- Seeking to confirm that an individual's contact information remains accurate if the individual places an inbound call to the organization's customer service line;
- Taking other steps to encourage or require (i.e., through contractual provisions) an

[7] Id., at p. [32]

[8] Id., at pp. 708-709.

[9] Second FNPRM, at p. 3.

[10] *Consumer and Governmental Affairs Bureau Seek Comment on Interpretation of Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, FCC DA 18-493, CG Docket 18-152 and 02-278, (rel. May 14, 2018) (*ACA Remand Notice*).

individual to notify the caller if his or her telephone number changes; or

- Adopting internal policies or procedures, including for example a process to update databases in a timely manner when new contact information is received.

Actual knowledge of the reassignment would mean that the caller could no longer "intend" to reach their consenting customer (the prior subscriber) at that number.

IV. The FCC Should Also Adopt a Safe Harbor for Callers That Utilize Reassigned Numbers Compliance Solutions.

Because of its role in regulating the TCPA and its exclusive jurisdiction of the telephone numbering system established under Section 251(e) of the Communications Act of 1934 (Communications Act), the FCC is in a unique position to address and solve the shortcomings of the FCC's "one-call safe harbor" identified by the D.C. Circuit Court in the *ACA Int'l.* case.[11]

Callers that take proactive steps, including the use of compliance solutions, to ensure that they are reaching their intended recipient should be protected from TCPA liability. For example, if the FCC determines that "called party" means "intended recipient," when that caller checks one or more phone number database(s) and finds no change in the intended recipient's number, but nevertheless reaches a reassigned number inadvertently, the caller does not violate the TCPA because it has established that it "intended" to reach the prior subscriber (who had granted consent). Under this approach, checking a reassigned numbers database would be sufficient – but not necessary – to establish that the caller "intended" to reach the recipient or reasonably relied on the "prior express consent" it had obtained. Other "best practice" steps could demonstrate intent/reliance, as mentioned above.

[11] *ACA Int'l*, at pp. 706-709.

If the FCC were to create a new database, the safe harbor should also apply to parties that check that database. However, consulting a database should not be a mandatory obligation on callers (or a prerequisite to avoiding liability exposure in the event of an inadvertent call to a reassigned number).[12] The safe harbor should allow for a reasonable amount of time prior to the call during which a caller can check the database, to avoid having to check the database before every single call.

The establishment of a realistic safe harbor is particularly critical for SLSA's members given the importance of reaching borrowers. As SLSA and some of its members informed the Commission in connection with its implementation of the Bipartisan Budget Act (BBA), we are not calling merely to demand payment, but to find out whether there is a manageable repayment plan that will help struggling borrowers avoid further delinquency and default.[13] The student loan program is enormously complex, with a plethora of options designed to help borrowers afford their student loan debt payments (15 possible repayment plans, including 6 different income-driven repayment plans; 21 types of deferments; 13 types of forbearance; 8 different loan forgiveness/discharge options). These options are so complex that many borrowers are overwhelmed and need help navigating their choices. Live contact is absolutely key to helping federal student loan borrowers select their best repayment option and stay current on their loans. An effective safe harbor that lifts the risk of litigation not only protects the caller, but also helps ensure that borrowers obtain this important information.

[12] The Commission made it clear in the Second FNPRM that it is "not proposing to mandate that callers use a reassigned numbers database in order to comply with the TCPA." *See,* Second FNPRM, p. 9, para. 30.

[13] *See, e.g.*, Comments of SLSA, CG Docket No. 02-278, at 6-9 (filed June 6, 2016); Comments of Navient Corp., CG Docket No. 02-278, at 2-8 (filed June 6, 2016).

V. SLSA Responses to the Commission's Questions re Database Information, Access, and Use.

We agree with the FCC's goals for an effective reassigned numbers database: it should contain comprehensive and timely data to enable callers to determine potential reassignments as quickly as possible. It should be both easy to use and cost-effective for callers while minimizing the burden on service providers supplying the data. We also agree that a caller would possess the minimum information assumed by the Commission – name of consumer the caller is trying to reach, telephone number, and date (which might vary, depending on the circumstances) on which the caller was confident that the consumer was associated with that number.

In discussing how the database would operate, SLSA members have been assuming that a caller would query the database using the telephone number and date, and that the database would provide a binary "yes" or "no" answer as to whether that number has been assigned since the date in question. We are concerned about entering the consumer's name as part of the match criteria based on experience with the Department of Defense's DMDC database,[14] which servicers are required to use to verify whether any of our customers are active duty servicemembers and therefore eligible for an interest rate reduction on their student loans under the Servicemembers Civil Relief Act.[15] In that database we are providing a name, birth date, and social security number and an active duty status date. The name is the data element that causes the most problems, particularly if it is hyphenated, or there has been a change in marital status. And because the consumer may not use their full proper name when purchasing a cell phone, we think that may exacerbate mismatches with student loan records. In addition, we have

[14] Available at https://scra.dmdc.osd.mil/scra/#/home

[15] 50 U.S.C. § 3937

concerns about transmitting any more personally identifiable information (PII) than is absolutely necessary; we would recommend that the data being exchanged be as limited as possible.

In trying to think about how the database would operate, we found it helpful to consider a concrete example using a timeline. Assume that Consumer A has had a telephone number assigned to his cellphone since November 1, 2017. The number is disconnected on February 15, 2018, and on May 1, 2018, it is reassigned to the cellphone of a new subscriber, Consumer B, who applies for a student loan on May 31, 2018. We would like for the database to operate so that it provides a "yes" answer in response to any reassignment query using the date range of February 15, 2018 through April 30, 2018. But queries using a date on or after May 1 should return a "no." In order to operate that way, the database would have to "know" both the disconnect date and the reassignment date. If the database only uses the disconnect date, would it be able to respond correctly when there is an extended aging period and when the number is in fact reassigned?

SLSA members are concerned about the possibility of temporary disconnections creating false positives in terms of reassigned numbers. But we do not have sufficient information on how frequently numbers are temporarily disconnected to assess the extent of this problem.

In terms of the comprehensiveness of the database, SLSA members believe that, given the risk of TCPA litigation, and the growing use of class actions, it must be comprehensive, and data is needed from all types of voice service providers. To the extent that it cannot be completely comprehensive, then that increases the need for a safe harbor. Similarly, in terms of the timeliness of the database, callers need certainty regarding how often the data is updated so that they can create inquiry protocols that ensure we are getting accurate information. A

minimum aging period, or else tailoring reporting frequency to how long a service provider ages numbers would be helpful in providing certainty.

Regarding timeframe, the issue of reassigned numbers is particularly complex in the student loan context, as there is frequently a span of several years or more between when the borrower obtains a loan and provides his or her contact information, including phone number, and when the payments are due. This passage of time increases the likelihood that the borrower may change his or her telephone number and not think to notify the servicer as he or she is required to do by the master promissory note for the loan.[16]

We agree with the *NOI* commenters that the format of the of the information needs to be in an easily accessible, usable and consistent file format.[17] If possible, it would be preferable to have more than one format, so that smaller businesses can use a very common, simple format such as comma-separated values (CSV), while large businesses are able to utilize something more sophisticated.

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[16] For example, the master promissory note for a Direct Loan Program loan requires the borrower to report to the servicer certain changes in the borrower's personal information:

> 7. INFORMATION YOU MUST REPORT TO US AFTER YOU RECEIVE YOUR LOAN
>
> You must notify your servicer and/or the financial aid office at your school about certain changes.
>
> Until you graduate or otherwise leave school, you must notify your school's financial aid office if you:
>
> •Change your address or telephone number;
>
> . . . .
>
> You must also notify your servicer if any of the above events occur at any time after you receive your loan.

Id.

[17] *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Notice of Inquiry, FCC 17-90, CG Docket 17-59 (rel. July 13, 2017) ("*NOI*")

In terms of user access to database information, we agree with the Commission that there are likely to be two camps of users – those who use the database directly and those who use a third-party service to access the database. We have no objections to certifying that our purpose in using the database is only for TCPA compliance, and to registering in order to use the database. We share the Commission's concerns that the database not be used for fraudulent robocallers or other bad actors, or for marketing or other improper purposes.

We strongly urge the Commission to ensure that the cost of using the database is reasonable. There are 44 million student loan borrowers in the United States, most of whom rely solely on cellphones. Federal student loan servicers are required by law to make calls to delinquent borrowers in order to prevent further delinquency and default. A reassigned numbers database would be a very helpful tool but only to the extent that it is affordable.

As set forth above in Section III of these comments, SLSA also strongly urges the Commission to create a safe harbor for use of the database, as well as for other steps that callers can take to demonstrate their good faith attempt to reach the intended recipient of the call.

In its 2015 Order, the Commission adopted an unrealistic "one-call safe harbor."[18] The Circuit Court held that the FCC's one-call safe harbor was arbitrary and capricious, but it did not say that the FCC lacked the authority to adopt a more reasonable safe harbor, or any safe harbor at all. In fact, the Court specifically stated that "[t]he TCPA vests the Commission with the responsibility to promulgate regulations implementing the Act's requirements…. As Congress explained, the FCC 'should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of

[18] 2015 Order, at p. 49, para. 89.

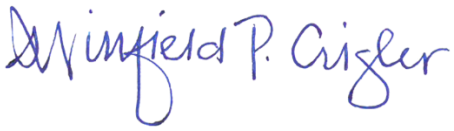
privacy.' " (cites omitted).[19] The Commission has regularly exercised that authority. Moreover, as the Commission itself has recognized, in cases such as this, where the broad parameters of the law creates ambiguities or requires further detail, it is incumbent on the Commission to do so.

Conclusion

SLSA's members are very interested in and supportive of the Commission's efforts to explore the possibility of a reassigned number database. SLSA members would use such a database so long as it is accurate, economical, and would provide a safe harbor against TCPA liability. Such a resource, however, may take some years to implement and become operational. In the meantime, given the pressing need to reach struggling student loan borrowers in order to help them avoid delinquency and default, SLSA urges the Commission to adopt a more immediate solution to address the issue of reassigned numbers by revising the misguided definition of "called party" to mean the intended recipient where the caller has a good faith belief that the recipient is still at the number provided to the caller, and to permit callers to demonstrate that they intended to reach the prior subscriber based on a variety of facts and reasonable steps to verify the subscriber. In addition, as the Commission moves forward with the database, we are hopeful that it will do so in consultation with both the service providers and the industries who will be using the database. We think that additional notice and comment periods will be necessary during the development of any database so that we can ensure that systems integration will be achievable.

[19] *ACA Int'l*, at p. 693.

Respectfully submitted on behalf of SLSA,



Winfield P. Crigler
Executive Director
Student Loan Servicing Alliance (SLSA)
1100 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036
(202) 955-6055
wpcrigler@slsa.net

June 7, 2018